BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RAUL HURTADO, JR. Claimant	)	
V.	)	
I & A PAINTING AND REMODELING Respondent	)	Docket No. 1,058,894
AND	)	
PHOENIX INSURANCE COMPANY Insurance Carrier	)	

ORDER

Claimant requested review of the July 10, 2015, Award entered by Administrative Law Judge (ALJ) Gary K. Jones. Aldo P. Caller and John B. Gariglietti, of Overland Park, Kansas, appeared for claimant. Dallas L. Rakestraw, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

On November 11, 2011, claimant had an epileptic seizure, fell from a ladder and was injured. The ALJ found the prevailing factor for claimant's injury, medical condition, and resulting disability or impairment was his seizure and denied claimant's request for workers compensation benefits. The ALJ wrote:

> While it is certainly true the Claimant's injuries were caused by him striking the ground, the fall that caused the Claimant to strike the ground was directly caused by the epileptic seizure. In this Court's view, the epileptic seizure and the fall are so closely connected that they cannot be divided into separate events.[1]

The Board has carefully considered the entire record and adopted the stipulations listed in the Award.

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[1] ALJ Award (July 10, 2015) at 6.

ISSUES

Claimant argues his injury by accident arose out of and in the course of his employment. Claimant contends respondent placed him in a position of enhanced risk of injury; and the prevailing factor for his injury by accident must be work. Claimant argues K.S.A. 2011 Supp. 44-508(f) violates the Americans with Disabilities Act, the Kansas Human Rights Act, and the Fourteenth Amendment of the United States Constitution. Finally, claimant contends the ALJ's finding was contrary to the weight of the evidence.

Respondent admits claimant sustained personal injury. At oral argument, respondent admitted claimant proved the requirements of K.S.A. 2011 Supp. 44-508(f)(2)(B)(i & ii), namely that there was a causal connection between the conditions under which the work was required to be performed and the resulting accident, and that the accident was the prevailing factor causing claimant's injury, medical condition, and resulting disability or impairment. However, respondent maintains claimant's accident or injury arose from a risk personal to claimant and is therefore not compensable based on K.S.A. 2011 Supp. 44-508(f)(3)(A)(iii). Further, respondent contends the Board lacks authority to determine the constitutionality issues.

The issues are:

1. Did claimant's injury by accident arise out of and in the course of his employment?

2. Does K.S.A. 2011 Supp. 44-508 violate the equal protection provisions of the Fourteenth Amendment to the United States Constitution?

FINDINGS OF FACT

On November 11, 2011, claimant was working for respondent on a ladder when he had a seizure and fell. Claimant testified he had a headache, which indicated he would likely have a seizure, while on the ladder. He could not get off the ladder, and he eventually blacked out. Claimant stated he did not recall falling from the ladder, and he did not recall anything between having a headache while on the ladder and waking at home. Claimant sustained injuries to his neck and back.

Claimant has a history of epilepsy, and seizures were a common occurrence. Claimant had two previous motor vehicle accidents as a result of seizures. In 2007, claimant settled a workers compensation claim with a different employer after he had a seizure and fell from a ladder, injuring his back.

Claimant testified respondent was aware of his condition. On November 2, 2011, shortly before the subject accident, claimant had a seizure while working, which was

witnessed by two of respondent's owners.[2] Claimant testified he was laid off following the seizure, but respondent called him back four or five days later because they needed help. Claimant stated respondent assured him he would not be on ladders if he returned to work, but would instead work from the ground. However, on November 11, 2011, claimant was directed to work outside on a ladder. Claimant testified he did as he was told due to the belief he "would have got fired" if he did not.[3]

After claimant fell, he was taken by ambulance to the hospital. Claimant underwent surgery for a fracture of his cervical spine on November 12, 2011. Claimant was released from the hospital shortly thereafter and treated with pain medication and physical therapy.

Claimant was seen by Dr. George Fluter on February 15, 2012, at the request of claimant's attorney. After reviewing claimant's history, medical records, and performing a physical examination, Dr. Fluter diagnosed claimant with a C7 burst fracture with spinal canal compromise; L5 superior endplate fracture; and left transverse process fractures of the second, third and fourth lumbar vertebrae. Dr. Fluter concluded:

> Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between [claimant's] current condition and the reported injury of 11/11/11 and its sequelae.
>
> The prevailing factor is the injury occurring on that date. More than the seizure per se, the fall from height resulted in the injuries.[4]

On June 20, 2012, Dr. Joseph Galate performed an independent medical evaluation of claimant as a result of an agreed order by the parties. Dr. Galate reviewed claimant's history, medical records, and performed a physical examination. He found claimant sustained a burst fracture at C7 and a superior endplate compression fracture at L5. Dr. Galate noted claimant has a history of uncontrolled seizure disorder that has required multiple medications over the years. He opined:

> I am currently leaning towards the patient's seizure disorder being the prevailing factor for the patient falling off a ladder and sustaining a burst fracture at C7 and a compression fracture at L5. The fall and subsequent fractures were secondary to the patient having a seizure while standing on a ladder.[5]

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[2] See R.H. Trans. at 18.

[3] *Id*. at 26.

[4] Fluter Depo., Ex. 2 at 6.

[5] R.H. Trans., Resp. Ex. 1 at 6.

Following a preliminary hearing, the ALJ issued an Order dated March 28, 2013, denying medical treatment and temporary total disability benefits on the basis claimant's preexisting seizure disorder was the prevailing factor causing claimant's fall, injury, and need for medical treatment. Claimant appealed, and a single Board Member affirmed the ALJ's Order on June 13, 2013, finding claimant's accidental injury was caused directly or indirectly by an idiopathic cause and arose from a risk personal to claimant.[6] The Board Member also concluded the prevailing factor in causing claimant's accidental injury was his personal condition of epilepsy.

At his counsel's request, claimant returned to Dr. Fluter on August 26, 2013. His assessment remained unchanged from February 2012. Dr. Fluter wrote:

> Based upon the available information and to a reasonable degree of medical probability, there is a causal/contributory relationship between [claimant's] current condition and the reported work-related injury of 11/11/11 and its sequelae.
>
> The prevailing factor for the injury, the need for medical evaluation/treatment and the resulting impairment/disability is the reported work-related injury occurring on that date. More than the seizure per se, the fall from height resulted in the injuries.[7]

Dr. Fluter testified that while a seizure generates muscular force, it is generally insufficient to cause a burst fracture. He explained, "[T]here usually has to be some force of part of the body striking something to result in the burst fracture. So a fall from a height is more likely to do it than just say the routine – than just having a seizure in and of itself."[8]

Using the AMA *Guides*,[9] Dr. Fluter opined claimant sustained a combined 39 percent permanent partial impairment to the whole body as a result of the November 11, 2011, accident.[10] Dr. Fluter testified he did not include any preexisting impairment in his rating opinion. Dr. Fluter recommended permanent restrictions relative to a light/medium physical demand level.

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[6] See *Hurtado v. I & A Painting and Remodeling*, No. 1,058,894, 2013 WL 3368487 (Kan. WCAB June 13, 2013).

[7] Fluter Depo., Ex. 3 at 4.

[8] Fluter Depo. at 24-25.

[9] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[10] See Fluter Depo., Ex. 3 at 5.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b(b) states an employer is liable to pay compensation to an employee for personal injury by accident arising out of and in the course of employment. Whether an accident arises out of and in the course of employment is fact dependent.[11] The phrases arising "out of" and "in the course of" employment are conjunctive; each condition must be proven before compensation is allowed. Claimant has the burden to prove the right to an award using a "more probably true than not true" standard based on the whole record.[12]

K.S.A. 2011 Supp. 44-508 states, in part:

(f)(2)(B) An injury by accident shall be deemed to arise out of employment only if:

> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

> (i) Inury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
>
> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

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[11] See *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[12] K.S.A. 2011 Supp. 44-501b(b) and K.S.A. 2011 Supp. 44-508(h).

ANALYSIS

1. Both claimant's accident and injury arose of a risk personal to him – a seizure caused by his epilepsy – such that his injury by accident did not arise out of and in the course of his employment.

The Board finds the claim is barred pursuant to K.S.A. 2011 Supp. 44-508(f)(3)(a)(iii), because claimant's accident or injury arose out of a risk personal to him. The primary factor, in relation to any other factor, for causing claimant's injury was claimant's epileptic seizure, a personal condition.

When a workers compensation statute is plain and unambiguous, a court must give effect to its express language rather than determine what the law should or should not be. A court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If statutory language is clear, no need exists to resort to statutory construction.[13]

Tyler states, "Judicial blacksmithing will be rejected even if such judicial interpretations have been judicially implied to further the perceived legislative intent."[14]

K.S.A. 2011 Supp. 44-508(f)(3)(a)(iii) plainly, unambiguously and clearly states that an accident or injury that arose out of a risk personal to the worker does not arise out of and in the course of employment. This is a dramatic change in the law. Prior to May 15, 2011, the Kansas Workers Compensation Act (KWCA) excluded from the definition of "arising out of and in the course of employment" just two scenarios – what is commonly called the "going and coming" rule and injuries occurring at recreational or social events in which the employee had no duty to attend and where the injury was not due to performing job duties.[15]

The prior law had a judicial definition of "arising out of and in the course of employment." The phrases arising "out of" and "in the course of" employment are conjunctive; each condition must be proven before compensation is allowed. The phrases were *judicially* interpreted as follows:

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[13] See *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676, 678 (2009).

[14] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010).

[15] The prior law also precluded compensation for deliberate intention to cause injury, injuries caused by willful failure to use a guard or protection and injury, and disability or death contributed to by the use of alcohol or drugs. K.S.A. 2010 Supp. 44-501. K.S.A. 2010 Supp. 44-508(e) excluded from the definition of "personal injury" a disability suffered as a result of the natural aging process or by the normal activities of day-to-day living. However, the prior version of the KWCA did not go so far as to state injuries in connection with such circumstances did not arise out of and in the course of employment.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[16]

Whereas the prior law had a judicial interpretation of what did arise out of and in the course of employment, the prior law did not have a legislative preclusion for an accident or injury which arose out of a risk personal to a worker. Our current statutory scheme does not affirmatively define what does arise out of and in the course of employment, but does define what does not arise out of and in the course of employment. We have no judicial interpretation of K.S.A. 2011 Supp. 44-508(f)(3)(a)(iii) that would provide guidance or precedent.

Claimant argues the claim is compensable under *Bennett*,[17] which provides that when an "injury results from the concurrence of some preexisting idiopathic condition and some hazard of employment, compensation is generally allowed."[18] *Bennett* defined an "idiopathic" condition or risk to mean the same thing as a "personal" condition or risk.[19] More recently, the Kansas Court of Appeals stated, "doctors use the term idiopathic to refer to something for which the cause is unknown."[20] Whatever the definition of "personal" or "idiopathic," the Kansas Legislature indicated in K.S.A. 2011 Supp. 44-508(f)(3)(A) that accidents or injuries caused by either type of risk or cause do not arise out of and in the course of a worker's employment.

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[16] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[17] *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992).

[18] *Bissen v. Hy-Vee Food Stores*, No. 92,457, 102 P.3d 1205 (Kansas Court of Appeals unpublished opinion filed Dec. 30, 2004)*;* citing *Bennett v. Wichita Fence Co.*, 16 Kan.App.2d 458, 460, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992).

[19] *Bennett*, 16 Kan. App. 2d at 460. See also *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 11, 61 P.3d 81 (2002).

[20] *Kuxhausen v. Tillman Partners, L.P.*, 40 Kan. App. 2d 930, 935, 197 P.3d 859 (2008) *aff'd*, 291 Kan. 314, 241 P.3d 75 (2010).

Bennett recognized that a seizure is personal to a claimant.[21] In that case, Mr. Bennett had a seizure while driving during work and was injured in a car accident. The Court noted Mr. Bennett's employment (driving a company vehicle) placed him at an increased risk. The Court held the concurrence of a personal risk and an employment risk made Mr. Bennett's injury arise out of his employment.

The Board would follow *Bennett* if such case concerned interpretation of the Legislature's amendments that went into effect on May 15, 2011. However, *Bennett* did not involve the current statutory scheme. To be blunt, the rules have changed. Regardless of whether we like the result, *Bergstrom* states we must follow the law as written, and we are not to add something to the law that is not there.

Unfortunately, this is precisely what the dissent is doing. The dissent wants to read into the new statutory scheme that *Bennett* still applies. The dissent contends an accident or injury that combines personal and employment risks is compensable. However, the current statutory arrangement takes out of the realm of compensability accidents or injuries that arose out of personal causes, irrespective of any added risk of employment. The KWCA also does not say that an employment risk combined with a personal risk results in compensability. The statute at issue does not preclude an accident or injury from arising out of and in the course of employment if the accident or injury arises out of only, solely or strictly a personal risk. In this case, the cause of claimant's accident and injury was his epilepsy, a personal risk.

The dissent also argues *Bennett* is still good law because the case is cited in *Smalley*,[22] an unpublished decision. This rationale is incorrect for two reasons. First, the Kansas Court of Appeals in *Smalley* mentions the current version of K.S.A. 2011 Supp. 44-508(f)(3)(A)(iii) as excluding from "arising out of and in the course of employment" injuries from a risk personal to a worker. The Court then stated, "Where an employment injury is **clearly** attributable to a personal condition of the employee **and no other factors intervene or operate to cause or contribute to the injury**, that injury is not compensable. [Emphasis added.]" The statute does not contain such language. Rather, the plain language of K.S.A. 2011 Supp. 44-508(f)(3(A)(iii) does not limit the legislative preclusion to injuries that are "clearly attributable to a personal condition" and the statute does not speak of other factors which may cause or contribute to an injury. The statute simply says an accident or injury that arose out of a risk personal to the worker does not arise out of and in the course of employment.

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[21] *Bennett*, 16 Kan. App. 2d at 460.

[22] *Smalley v. Skyy Drilling*, No. 111,988, 2015 WL 4366531 (Kansas Court of Appeals unpublished opinion filed June 26, 2015).

Second, the commentary in *Smalley* regarding *Bennett* is dicta. The holding in *Smalley* is that his death was the compensable result of a work-related accident and not excepted from compensation as being due to either a personal or neutral risk.[23]

Obviously, the Board recognizes claimant's employment put him on a ladder and he fell from such ladder. Claimant thus faced a causal connection between his accident and his required work conditions.[24] However, our current law still precludes an accident or injury arising out of a personal risk from arising out of and in the course of employment even where there is a link between an injury by accident and employment. Under the current statutory scheme, K.S.A. 2011 Supp. 44-508(f)(2)(B), "An injury by accident shall be deemed to arise out of employment only if: (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment." Thus, the law still requires a causal connection to employment. Respondent admits claimant proved the requirements of K.S.A. 44-508(f)(2)(B)(i & ii). However, even if there is a causal connection between work conditions and the accident, *i.e.*, what could be called an employment risk, claimant would still need to get around the additional language limiting what "arises out of and in the course of employment" as contained in the very next section of the law – K.S.A. 2011 Supp. 44-508(f)(3)(A). We do not see how the law can be applied any differently to the facts of this case. Even if we were to disagree with the result, the law says what it says and our job is to apply the law as written. We could follow *Bennett*, but to do so would be ignoring statutory amendments enacted by our Legislature and reading something into the written law that is not there.

The *Moore*[25] and *Bryant*[26] cases cited by the dissent do not interpret the 2011 amendments to the KWCA with respect to an accident or injury not arising out of and in the course of employment when it arises out of a personal risk. Those cases only concern the day-to-day provisions in the older and newer versions of the KWCA.

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[23] A third concern is that *Bennett* is based, at least in part, on Professor Larson's treatise, *Larson's Workers' Compensation Law*. The Kansas Supreme Court cautioned against replacing the criteria spelled out in a statute with Professor Larson's commentary. *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 561, 293 P.3d 723 (2013).

[24] This causal connection between required work duties and the resulting accident could arguably be defined as a risk of employment. However, K.S.A. 2011 Supp. 44-508(f)(2)(B)(i) does not concern an increased risk of employment to satisfy the "arising out of employment" requirement, only that there be a "causal connection." K.S.A. 2011 Supp. 44-508(f)(2)(A)(i & ii), which concerns injury by repetitive trauma, requires an "increased risk or hazard" from the worker's employment to satisfy the "arising out of employment" criteria.

[25] *Moore v. Venture Corp.*, 51 Kan. App. 2d 132, 139-41, 343 P.3d 114 (2015).

[26] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 596, 257 P.3d 255 (2011).

The dissent apparently contends that if an accident or injury has an employment connection, claimant's accident or injury therefore did not arise out of a personal risk. The majority agrees with the dissent that claimant's injury is due to both his personal condition and his work placing him in a hazardous situation. However, the KWCA does not say such a situation is compensable. The new law only says accidents or injuries which arose out of a risk personal to a worker do not arise out of and in the course of employment. Here, the question is simple: did claimant's accident or injury arise out of a personal risk? We conclude claimant's accident and his resulting injuries were occasioned by his seizure. Therefore, if we follow the law as written that accidents or injuries arising out of personal risks do not arise out of and in the course of employment, the case is not compensable. Arguably, the Board could decide claimant's accident and injury were not due to a personal risk because he was engaged in his job duties, but to do so would ignore that but for claimant's personal seizure disorder, he would have not suffered an accident or injury. Both claimant's accident and injury thus arose out of his personal risk. Without his seizure disorder, he would not have fallen and been injured. K.S.A. 2011 Supp. 44-508(f)(3)(A)(iii) excludes accidents or injuries which arise out of a risk personal to the worker.

2. The Board cannot address whether K.S.A. 2011 Supp. 44-508 violates the equal protection provisions of the Fourteenth Amendment to the United States Constitution.

Claimant contends K.S.A. 2011 Supp. 44-508(f) violates the Fourteenth Amendment of the United States Constitution. The Board is not a court established pursuant to Article III of the Kansas Constitution and does not have the authority to hold an Act of the Kansas Legislature unconstitutional. Statutes are presumed to be constitutional.[27] Administrative agencies are generally not empowered in Kansas to determine the constitutionality of a statute or administrative regulation.[28] Claimant may preserve the constitutionality arguments for future determination before the proper court.

CONCLUSION

Claimant's accident and injury arose from a personal risk and is barred by K.S.A. 2011 Supp. 44-508(f)(3)(A)(iii). The Board does not have jurisdiction to rule on issues concerning the constitutionality of a statute.

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[27] See *Blue v. McBride*, 252 Kan. 894, 850 P.2d 852 (1993).

[28] See *Gates v. Brighton Painting Company*, No. 181,593, 1994 WL 749436 (Kan. WCAB Dec. 6, 1994); citing *Zarda v. State*, 250 Kan. 364, 826 P.2d 1365 (1992), and *In re Residency Application of Bybee*, 236 Kan. 443, 691 P.2d 37 (1984).

ORDER

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Gary K. Jones dated July 10, 2015, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2015.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned respectfully dissent from the majority's finding claimant's injury arose from a personal risk and is not compensable.

The dissent recognizes there is often a mix or combination of a personal risk and work risk for an accident. Clearly, there was both an element of personal risk and work risk to claimant's accident. In this instance, placing claimant in the hazardous position of working on a ladder while knowing he recently had epileptic seizures, the work risk far outweighed the personal risk to claimant. Because respondent placed claimant on a ladder – a precarious position – his accidental injury occurred in association with an employment risk. Common sense (and Dr. Fluter's opinion) dictate claimant's injury would not have been as severe had his employment not heightened his risk of injury.

In *Moore*,[29] the Kansas Court of Appeals indicated case law interpreting the pre-2011 version of the KWCA would still apply to interpret post-2011 Legislative amendments,

[29] *Moore, supra.*

at least those excluding injuries occurring as a result of "normal activities of day-to-day living" from the definition of "arising out of and in the course of employment." Following *Bryant*,[30] the Court noted the context of what a worker is doing, *i.e.*, whether he or she is doing his or her job, determines if a worker's injury arises out of and in the course of employment.

This situation is highly similar to *Moore* and *Bryant*. In those cases, workers were injured performing work duties, and their cases were compensable. Here, claimant was doing his job on a ladder when he fell and was hurt. His case should likewise be compensable.

Our Supreme Court has recognized three general risks: "(1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) the so-called neutral risks which have no particular employment or personal character."[31] Risks from the first category are compensable, and risks in the second category do not arise out of employment and are not compensable.[32] Claimant fell from a ladder. Falling from a ladder is not a personal risk. Falling from a ladder is an employment risk.

Finally, *Bennett* continues to be the rule of law. *Bennett* was applied by the Court of Appeals to a post May 15, 2011, claim in *Smalley.*[33] In *Smalley*, the Court of Appeals adopted *Bennett*, writing:

> The phrase "arising out of or in the course of employment" does not include injuries from a risk personal to the worker. K.S.A.2014 Supp. 44–508(f)(3)(A)(iii). Where an employment injury is clearly attributable to a personal condition of the employee and no other factors intervene or operate to cause or contribute to the injury, that injury is not compensable. But where an injury results from a preexisting condition and some hazard of employment that overlap, compensation is generally allowed. *Bennett v. Wichita Fence Co.,* 16 Kan.App.2d 458, 460, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992). In Bennett, the claimant suffered from epileptic seizures and had a seizure while driving a company vehicle, blacked out, and hit a tree. A panel of this court held the conditions of the claimant's employment (driving the company vehicle) put him in a position of increased risk. The panel concluded this increased risk provided the required causal connection between his injury and his employment necessary to find the accident arose out of his employment. 16 Kan.App.2d at 460. The panel noted: "While the seizure was personal to claimant, the risk of travel

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[30] *Bryant, supra*.

[31] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

[32] *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 88, 200 P.3d 479 (2009). The third category does not apply to this case.

[33] *Smalley, supra.*

arose out of the employment and the two concurred to produce the injuries." 16 Kan.App.2d at 460.[34]

In the present case, the injury occurred due to claimant's preexisting epilepsy overlapped with a hazard of employment, falling off a ladder. As stated above, climbing a ladder is a hazard of employment.

Another significant factor in this case is that respondent knew about claimant's seizure disorder. Notwithstanding the potential risk, respondent placed claimant in a position which required him to climb a ladder. A week before the injury giving rise to this claim, respondent's owners witnessed claimant having an epileptic seizure at work. Knowing that, when respondent placed claimant in a position that required him to climb the ladder, the risk was no longer personal to claimant. The risk became a work-related risk. Respondent risked the possibility, or probability, of claimant sustaining a work injury and having to defend a workers compensation claim.

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BOARD MEMBER

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Hon. Gary K. Jones, Administrative Law Judge

[34] *Id.* at 6.